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15 UNITED STATES DISTRICT COURT

16 NORTHERN DISTRICT OF CALIFORNIA

17 SAN JOSE DIVISION

18 KRISTAL NUCCI and KELLY SHAW, )  
19 individually and on behalf of all others )  
20 similarly situated and the California )  
21 Labor & Workforce Development )  
22 Agency, and ANA GOSWICK, )  
23 individually and on behalf of all others )  
24 similarly situated, )

25 Plaintiffs,

26 v.

27 RITE AID CORPORATION, )  
28 THRIFTY PAYLESS, INC. and DOES )  
1-10, inclusive, )

Defendants.

Case No.: 19-cv-01434-LHK

**DECLARATION OF DWIGHT STEWARD,  
PH.D., IN SUPPORT OF PLAINTIFFS'  
OPPOSITION TO DEFENDANTS' MOTION  
TO DECERTIFY CLASS**

The Honorable Lucy H. Koh

Date: September 30, 2021

Time: 1:30 p.m.

Courtroom: 8, 4th Floor, San Jose

**DECLARATION OF DWIGHT STEWARD, PH.D. IN OPPOSITION TO MOTION TO  
DECERTIFY CLASS**

I, Dwight Steward, Ph.D., declare as follows:

1. I am an economist and statistician. I provided an expert report for plaintiffs in this action, which I will refer to herein as my “Report,” which further states my qualifications and experience. As part of Defendants’ Motion to Decertify Class, my Report was attached as Exhibit 7 to the Declaration of Sweta Patel at ECF Dkt. 98-2.

2. I reviewed Defendants’ Motion to Decertify Class and provide clarification of statements made by Defendants about my Report below.

3. Rite Aid contends in its Motion for Decertification that there is a discrepancy in my Report at paragraph 13 and my deposition testimony. *See*, Motion to Decertify, Page 14. There is no discrepancy. In my Report, at paragraph 13, I stated that “[a]ccording to Dr. Petersen’s survey results, the average number of pay periods that are reduced to clothing purchases is 5.5....” In my deposition, I confirmed that the statements made in paragraph 13 were based upon the survey results obtained by Dr. Petersen. For example, I stated the following in regard to questions by Rite Aid counsel about paragraph 13: “Again, as I said, I rely on Dr. Petersen for the numbers. Dr. Petersen told me that that’s from his survey results and that’s the number that should be used in the analysis for damages. The steps that he made, I don’t go into that. That’s not important to the scenario.” (Depo. 33:9-14) A true and correct copy of an excerpt of my deposition with the foregoing response is attached here in Exhibit 1. Thus, both my declaration and deposition testimony accurately state that the number of pay periods used for clothing purchases was based upon Dr. Petersen’s survey results.

4. Similarly, Rite Aid contends in its Motion for Decertification that Jeffrey Petersen, Ph.D. “verbally communicated his ‘projected potential number’ of 5.5 pay period violations, the basis for which is not in his Expert Report, to Dr. Steward’s office, leaving it to Dr. Steward to decide how to use the data to calculated minimum wage damages.” *See*, Motion to Decertify, Pages 22-23. This statement is inaccurate.

5. In April 2021, prior to my Report being written, Jeffrey Petersen, Ph.D., sent my

1 office a copy of his full survey results in an Excel format. In “Table 4” of the Excel, Dr. Petersen  
2 set forth data from the survey related to the number of paychecks reduced by purchases made by  
3 survey respondents. Dr. Petersen identifies the weighted average for one-time purchases, weighted  
4 average for multiple purchases within the same pay period, and the weighted average for multiple  
5 purchases in different pay periods. Below this data, Dr. Petersen then identifies the “Number of  
6 Paychecks Reduced by Clothing Purchases per Class Member” as 5.5. I produced a copy of the  
7 Excel provided to my office by Dr. Petersen in response to Rite Aid’s Notice of Deposition, Bate  
8 Stamped Plaintiffs 001465. A copy of “Table 4” of the Excel spreadsheet provided to my office  
9 by Dr. Petersen is attached here as Exhibit 2.

10 6. Along with providing this Excel spreadsheet, Dr. Petersen also confirmed in a  
11 telephone conversation with my office that based upon his survey results, he calculated that  
12 clothing purchases were made over an average of 5.5 pay periods.

13 7. For calculating minimum wages, I rounded down from the average of 5.5 pay  
14 periods to 5 pay periods as the number of paychecks reduced by clothing purchases.

15 8. Rite Aid contends in its Motion for Decertification that the Report “provides no  
16 evidence of employee wages at the time of purchases.” *See*, Motion to Decertify, Page 22. This  
17 statement is incorrect.

18 9. In my Report, I confirm that I reviewed the time keeping data provided by Rite Aid,  
19 which had wage rates listed in the data. As I state in Paragraph 12 of my Report: “The amount of  
20 money earned in each pay period for each class member is obtained from the time records  
21 provided by Rite Aid. The total amount in each day is calculated by multiplying the class  
22 member’s base hourly wage by the number of hours worked in that day. The total amount earned  
23 by the class member in a pay period is calculated by totaling the total pay earned in each day of  
24 that week.” Along with my report, I provided Rite Aid with all of the underlying data and  
25 calculations, which included employee wages for each pay period.

26 10. Rite Aid contends in its Motion for Decertification that “Dr. Steward makes no  
27 attempt to analyze the data, what little there is, to space out the purchases for the purpose of  
28 calculating minimum wages.” *See*, Motion to Decertify, Page 23. This statement is incorrect.

1 11. In my Report, I provided two calculations for the minimum wage violations, which  
2 both include an analysis of the data for spacing out the purchases for calculating minimum wages.  
3 The first calculation is based upon the assumption that class members made clothing purchases  
4 during the first 5 pay periods of their employment. In my deposition, I was asked “What supports  
5 that as the methodology to use in this case?” I provided the following response:

6 “Again, I believe it to be reasonable, and there is no data to tell me when  
7 that occurred, so in the absence of the data the next thing to do is figure out  
8 what’s reasonable. And from what I have seen in my experience as a labor  
9 economist, and as a professor teaching economics, as an employee, when  
10 you’re in a job that requires a uniform, you’re going to typically need to  
11 get those items at the beginning of your period, of the time at least at some  
12 point, because you need those clothes.

13 For example, we have some people in the data that only worked six pay  
14 periods, so obviously those would occur at the beginning for that period.  
15 So that’s just a reasonable assumption based on my knowledge of the labor  
16 market, based on my discussions with Dr. Petersen in terms of how his  
17 survey was done, based on all the information that we do have.” (Depo.  
18 36:6-37:2)

19 12. A true and correct copy of an excerpt of my deposition with the foregoing response  
20 is attached here in Exhibit 1.

21 13. The second calculation for minimum wage violations in my Report assumed that the  
22 class member made the uniform purchases in the weeks that the class member earned the most  
23 amount of money during their employment at Rite Aid. *See*, Report, fn. 2. Accordingly, in this  
24 second calculation, I spaced out the purchases for the purpose of calculating minimum wages.  
25 Taking the weeks when the class member had their highest income is the most conservative  
26 analysis of the data that could be implemented when calculating minimum wage violations.

27 ///

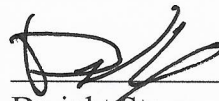
28 ///

1           14. I also spaced out the purchases for the purpose of calculating minimum wages  
2 for the survey participants. As I state in my Report, at Table 1.C., the survey participants  
3 responses were used in place of the average, if the individual reported pay period uniform  
4 purchases lower than the average. Thus, for example, if a survey participant responded that he  
5 or she made purchases over 3 pay periods, I used 3 pay periods for their minimum wage  
6 violation calculations. If the wages for the survey participant were not reduced below the  
7 minimum wage in the pay period, no minimum wage violation would be counted (which is the  
8 same as for other class members).

9           15. Rite Aid contends in its Motion for Decertification that “the Expert Damages  
10 Report does not similarly exclude individuals who worked 20 shifts or more.” *See*, Motion to  
11 Decertify, Page 25. I assume that there is an error in this statement, and it is meant to state  
12 “does not similarly excluded individuals who worked 20 shifts *or less*.” Based upon this  
13 assumption, Rite Aid’s statement is inaccurate because the damages analysis does reduce the  
14 damages for those class members that worked less than 20 shifts. For class members who  
15 worked less than 5 pay periods (i.e., less than 20 shifts), their damages were reduced  
16 proportionately. For example, for the damages for unreimbursed clothing purchases, the  
17 average amount spent of \$286 was reduced based upon the number of pay periods worked. If a  
18 class member worked two out of the five pay periods, the calculation was for two-fifths of the  
19 \$286. Accordingly, my Report did take into consideration the reduced purchases by class  
20 members who worked less than 20 shifts.

21  
22           I declare under penalty of perjury under the laws of the United States of America that  
23 the foregoing is true and correct.

24           Executed on August 2<sup>nd</sup>, at AUSTIN, TX

25  
26           

27           Dwight Steward, Ph.D.

**EXHIBIT 1**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

KRISTAL NUCCI, individually)  
and on behalf of others )  
similarly situated, et al.)

Plaintiffs, )

VS. )

Case No. 5:19-cv-01434-LHK

RITE AID CORPORATION )  
THRIFTY PAYLESS, INC., and)  
DOES 1-10, inclusive, )

Defendants. )

DEPOSITION OF:

DWIGHT D. STEWARD, PH.D.  
WEDNESDAY, JUNE 2, 2021  
10:45 A.M.

Job No. CS4617953

Reported by: GINA M. CLOUD

CSR No. 6315



1 that should be used. I didn't ask him.

2 Q. So to be clear, you don't know what the  
3 basis for that 5.5 number is, correct?

4 A. No, I do know the basis.

5 Q. Do you know how he calculated it?

6 A. No, I know the basis.

7 Q. What do you mean by that when you say the  
8 basis?

9 A. Again, as I said, I rely on Dr. Petersen for  
10 the numbers. Dr. Petersen told me that that's from  
11 his survey results and that's the number that should  
12 be used in the analysis for damages. The steps that  
13 he made, I don't go into that. That's not important  
14 to the scenario.

15 Q. So the basis, as you understand it,  
16 Dr. Petersen told you that's the number to use and  
17 told you it's in his survey results?

18 A. No. I'm going to go back to the way I  
19 described it. I had the discussion with Dr. Petersen  
20 in terms of that number of what number, how many pay  
21 periods are there. Dr. Petersen described the  
22 survey. We talked about that and he said 5.5 is the  
23 analysis -- is the number to use.

24 As far as how he got to that, that's on  
25 Dr. Petersen. I don't recall the specifics of what



1 purchases at the beginning of your employment because  
2 you need the clothes. But as I said before, I ran  
3 another scenario which is not dependent on the first  
4 five periods, but again, I think that's very  
5 reasonable.

6 Q. Let's keep talking about this scenario of  
7 the five, first five pay periods, for a moment.

8 What supports that as the methodology to use in this  
9 case?

10 A. Again, I believe it to be reasonable, and  
11 there is no data to tell me when that occurred, so in  
12 the absence of the data the next thing to do is  
13 figure out what's reasonable. And from what I have  
14 seen in my experience as a labor economist, and as a  
15 professor teaching economics, as an employee, when  
16 you're in a job that requires a uniform, you're going  
17 to typically need to get those items at the beginning  
18 of your period, of the time at least at some point,  
19 because you need those clothes.

20 For example, we have some people in the data  
21 that only worked six pay periods, so obviously those  
22 would occur at the beginning for that period. So  
23 that's just a reasonable assumption based on my  
24 knowledge of the labor market, based on my  
25 discussions with Dr. Petersen in terms of how his

1 survey was done, based on all the information that we  
2 do have.

3 Q. How much time was in each pay period?

4 A. I believe the pay periods are two weeks.

5 Q. So if I'm understanding what you're saying,  
6 you think it's the proper methodology to use the  
7 first five pay periods successively because people  
8 buy their clothing at the beginning of their  
9 employment?

10 MR. MARCY: Objection, mischaracterizes his  
11 prior testimony.

12 Go ahead and answer.

13 THE WITNESS: No, it's a whole lot more  
14 than that. I actually described quite a bit more  
15 than that.

16 Again, the first part is there is no data  
17 as to when those occurred, so that's the big issue  
18 so what has to happen now is to come up with  
19 different ways to estimate that. And as I've  
20 described before, and you can't just take this one  
21 analysis because I've done it this way, but I've  
22 also done it -- and it can be done, where I look at  
23 another period.

24 So as far as one methodology over the  
25 other, if the court wants to look at another one,

1 I, GINA M. CLOUD, a certified shorthand  
2 reporter for the State of California, do hereby  
3 certify:

4 that prior to being examined, the  
5 witness named in the foregoing deposition, was by me  
6 duly sworn to testify the truth, the whole truth,  
7 and nothing but the truth pursuant to Section No.  
8 2093 of the Code of Civil Procedure;

9 That said deposition was taken before  
10 me pursuant to notice, at the time and place therein  
11 set forth, and was taken down by me in shorthand and  
12 thereafter reduced to typewriting via computer-aided  
13 transcription under my direction;

14 I further certify that I am neither  
15 counsel for, nor related to, any party to said  
16 action, nor in anywise interested in the outcome  
17 thereof.

18 IN WITNESS WHEREOF, I have hereunto  
19 subscribed my name this 3rd day of June,  
20 2021.

21  
22   
23

GINA M. CLOUD

24 CSR No. 6315  
25

**EXHIBIT 2**

Table 4: Clothing purchase frequency questions and responses.

Question #	Question (Abbreviated)	Response	Number	Percent	Margin of Error
2F	Purchase timing?	All at Same Time	78	16.3%	3.3%
		Different Times	399	83.3%	
		DK / REF	2	0.4%	
		Total	479	100.0%	
2G	Number of Purchases	Weighted Average of 2F & 2G	6.6		
2H	All Purchases Two Weeks Apart?	Yes	320	80.2%	3.9%
		No	35	8.8%	
		DK / REF	44	11.0%	
		Total	399	100.0%	

Note: REF = Refused to answer question. DK = Don't know answer to question.

Sample Size 479  
Population 19,940  
Pop Adjust Factor 98.8%

Sample Size 399  
Population 19,940  
Pop Adjust Factor 99.0%

Average Amount of Total Purchases	\$286	
Percent That Made Only One Purchase	16.7%	
Percent That Made Multiple Purchases	83.3%	
-- All Purchases Two Weeks Apart (Percent of Total)	66.8%	
-- All Purchases Not Two Weeks Apart (Percent of Total)	16.5%	100.0%
Percent of the Class with One Pay Period Violation	33.2%	
Percent of the Class with Multiple Pay Period Violations	66.8%	
Average Purchases by Multiple Purchasers	7.7	
Weighted Average for Number of Purchases	6.6	
<b>Average Amount Spent Per Purchase</b>	<b>\$43.36</b>	
Estimate Number of Paychecks Reduced by Purchases		
-- Weighted Average for One-Time Purchasers	0.167	
-- Weighted Average for Multiple Purchases within Same Pay Period	0.165	
-- Weighted Average for Multiple Purchases in Diff Pay Periods	5.160	
<b>Number of Paychecks Reduced by Clothing Purchases per Class Member</b>	<b>5.5</b>	